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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

STATUTES INVOLVED.

Bankruptcy Act, section 1 (9) (11 U.S.C., §1 (9)) which provides that

> "'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending."

Bankruptcy Act, section 2 (a) (17) (11 U.S.C., §11 (a) (17)) which invests courts of bankruptcy with jurisdiction "at law and in equity" to

> "Approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice".

Bankruptcy Act, section 2 (b) (11 U.S.C., §11 (b)):

> "(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Bankruptcy Act, section 44(a) (11 U.S.C., §72 (a)):

> "(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers and the members of its board of directors or trustees or other similar controlling bodies, shall at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee appointed

fails to qualify as herein provided, the court shall make the appointment."

QUESTION INVOLVED.

Under the facts and circumstances of the case, was it irrational for the Court of Appeals to hold that the referee did not abuse his discretion when, acting on equitable grounds, he disqualified the claims of some of the creditors in the vote for trustee?

STATEMENT OF THE CASE.

Respondent and one England were rival candidates for election as trustee at the meeting of the bankrupt's creditors held May 20, 1954. The statement of affairs filed by the bankrupt on April 26, 1954, showed that claims of creditors amounted to $26,107.14. (R. 10-27.) Of this amount, a claim in the sum of $13,824.33 was held by relatives of the bankrupt. Claims held by members of the Board of Trade of San Francisco amounted to $4508.67. The statement of affairs also showed that the bankrupt had made an assignment of all his assets to the Board of Trade on December 17, 1953, and that the Board had in its possession $4054.88 belonging to the bankrupt. The assignment mentioned had been taken nominally in the name of Walter J. Hempy the secretary of the said Board. In filing his voluntary petition in bankruptcy the bankrupt necessarily repu-

diated the said assignment and the administration of his assets and affairs by the Board of Trade.

In contemplation of the said meeting of creditors various members of the said Board of Trade as a Creditors' Committee sent out to the creditors of the bankrupt a form letter on the letterhead of said Board of Trade soliciting their cooperation in the selection of a trustee and also soliciting their signatures to a letter of attorney running in favor of Shapro & Rothschild, attorneys for the Committee. (R. 49.) Claims of creditors thus solicited, obtained, and represented were disqualified by the referee and rejected in the vote for trustee, and the appointment of respondent rather than England resulted. (R. 28-30.)

The voluntary petition in bankruptcy was against the wishes of the Board of Trade, the nominal assignee, and the Creditors' Committee. It was not at all improbable that a Board of Trade sponsored trustee would favor those electing him or be subject to influence from them. It was not at all improbable that a controversy over the assets in the Board of Trade might develop, or a controversy over expenses or deductions claimed by the Board. In disqualifying the Board of Trade sponsored creditors, the referee manifestly exercised a sound discretion on equitable grounds. Among the findings of fact and conclusions of law made by the referee in his order appointing respondent trustee, were these:

> "(9) That in causing to be prepared and sent out the aforesaid letter and each of the aforesaid

nineteen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade.

(10) That, in the light of all the circumstances, it would not be, nor is it, for the best interest of all the creditors of Alfonso Paul Sanfillipo, and particularly the creditors who, or which, are not members of said Board of Trade to count the claims procured in the manner, and under the circumstances aforesaid, in voting for any candidate for trustee in the above-entitled manner. * * *

Because of the state of the record herein and, in the light of all the circumstances shown by said record, the court concludes:

(1) That Kal W. Lines has a majority, both in number and amount of the claims of creditors which are entitled herein to be voted for trustee.

(2) That, to allow any of the aforesaid nineteen (19) claims to be voted for any candidate for the herein trusteeship would be for the court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the bankruptcy court of this jurisdiction." (R. 52-54.)

ARGUMENT.

1. THERE IS NO IMPORTANT QUESTION OF LAW INVOLVED.

The decision of the Court of Appeals is based on the particular facts of the case. It is not a general condemnation of Boards of Trade, Credit Associations, or similar organizations, but is a simple holding that under facts and circumstances calling for the application of equitable principles the referee exercised a sound discretion and applied them. No general principle of law or equity has been overturned. The decision is confined to a specific factual setup, and will not be authority in subsequent cases lacking the same factual setup. What petitioners are apparently seeking by their certiorari petition is to have this Court revise or re-edit the factual setup as the Court of Appeals and the referee conceived it.

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2. THERE IS NO CONFLICT OF DECISION.

The decision of the Court of Appeals is in complete harmony with the cases it cites. Petitioners do not assert the contrary. Their assertion (Pet. p. 5) is that the decision is in conflict with *Garrison v. Pilliod Cabinet Co.*, 10 Cir. 1931, 50 F. 2d 1035. Petitioners are mistaken. There is no conflict. That case *approved* rejection of votes for a trustee solicited by a Credit Association and an assignee. It held (p. 1036) that "a supervisory power over the selection of a trustee is vested in the referee, to be exercised for good cause, in sound discretion". It also held (p. 1036) that "a trustee should not be selected when his posi-

tion may be inconsistent with the rendition of his duties to creditors in bankruptcy". The *Garrison* case, obviously, is in harmony with the present decision rather than in conflict with it.

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3. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The decision herein is that a court of bankruptcy is a court of equity applying the rules and principles of equity jurisprudence. Petitioners do not and cannot challenge that law. And the decision herein is that a referee in supervising the appointment of a trustee may apply the principles and rules of equity jurisprudence. Again, petitioners do not and cannot challenge that law. The decision herein, furthermore, is that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence and exercise a legal discretion to prevent the election of a trustee sponsored by a group or faction of creditors and an organization of which they were members, where it was not at all improbable that their candidate, if elected, would be subject to influence by the group, faction, or organization sponsoring him, and where it was not at all improbable that disputes over assets of the bankrupt might arise between a trustee and the faction, group, or organization, the latter having possession of all the assets of the bankrupt. Under such circumstances, a referee mindful of his duties, would have no alternative but to do what the referee in this case did, namely, to see that a trustee was appointed who would impar-

tially represent all creditors and be free from influence from any source. And under such circumstances, a court committed to the principles of equity and justice would have no alternative but to do what the Court of Appeals in this case did, namely, affirm the order of the referee. Obviously, the decision of the Court of Appeals is correct.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

Dated, San Francisco, California,
September 24, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.

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Petitioners,

—against—

KAL W. LINES,

Respondent.

MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

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IN THE

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MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Credit Men respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorneys for the petitioners herein has been obtained but the attorney for the respondent herein refuses to consent to the filing of a brief by the National Association of Credit Men as *amicus curiae*.

The question involved is the extent of the power of the court of bankruptcy to disallow the votes of credi-

tors in the election of a trustee in bankruptcy, and specifically whether creditors may be disfranchised merely because their proxies were solicited by a committee of creditors all of whom were members of a trade association to the secretary of which the bankrupt had made an assignment for the benefit of creditors.

The applicant, National Association of Credit Men, has an interest in this case in that the question presented for decision adversely affects the proper functioning of a nation-wide system created by its almost 35,000 members for safeguarding the administration of estates in bankruptcy against fraud and exploitation by persons seeking to advance their own interests as against the interests of general creditors.

The applicant believes that the question for decision is of paramount importance to the business interests of the country and should be reviewed by this Court, and that the argument of the petitioner herein as set forth in the Petition for Certiorari (a) inadequately sets forth the importance of the question presented, and (b) fails to point out the conflict between the decision in the instant case and prior decisions of other courts of equal jurisdiction with respect to the basis upon which the court of bankruptcy may exercise its jurisdiction pursuant to Section 2 (17) of the Bankruptcy Act to disapprove the appointment of trustees by creditors.

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BRIEF OF NATIONAL ASSOCIATION OF CREDIT MEN AS AMICUS CURIAE

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BRIEF OF NATIONAL ASSOCIATION OF CREDIT MEN AS AMICUS CURIAE

Interest of the *Amicus Curiae*

The *amicus curiae,* National Association of Credit Men, is a membership association comprising approximately 35,000 manufacturers, bankers and jobbers throughout the United States, and having affiliated local associations in 128 of the leading cities of the country.

The National Association of Credit Men was organized in 1896, at a time when there was no Bankruptcy Act, for the express purpose, among other things, of urging the enactment by Congress of a National Bankruptcy Act. One of its primary purposes has always been the improvement of bankruptcy administration.

The Association, its members and its affiliated organizations are jealous of the right accorded to creditors by Section 44a of the Bankruptcy Act to elect a trustee of their own selection. Creditors believe that such right is essential to honest and efficient bankruptcy administration, and that any decision which arbitrarily infringes upon such right is a grave threat to the integrity of bankruptcy administration. The Association regards the order of the Court of Appeals for the Ninth Circuit in this case as a dangerous and unwarranted infringement upon creditors' prerogatives in bankruptcy, and that the same is contrary to the spirit and intent of the Bankruptcy Act and in direct conflict with the decisions of other Circuits cited in this brief.

Statutes Involved

Bankruptcy Act, Section 2 (17) (11 U. S. C. A. Section 11 (17)) which provides that the courts of bankruptcy shall have jurisdiction to:

> "(17) approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;"

Bankruptcy Act, Section 44a, (11 U. S. C. A. Section 72 (a)) which provides:

> "a. The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee appointed fails to qualify as herein provided, the court shall make the appointment."

Question Presented

Is it within the discretion of the court of bankruptcy to deny to the members of a committee of creditors, none of whom are disqualified from voting by Section 44a of the Bankruptcy Act, the right to vote their own and other claims at the first meeting of creditors for the election of a Trustee in Bankruptcy, merely because as members of a trade association, to the secretary of which the bankrupt had made an assignment for the benefit of creditors, they solicited such claims for voting purposes, at a time when such trade association, or its secretary, had possession, as assignee, of funds belonging to the bankrupt?

Facts

The facts are substantially set forth in the petition for a writ of certiorari (pp. 4-6) and will not be repeated here except as necessary to the argument.

The Opinion Sought to Be Reviewed

The Court of Appeals held that approval or disapproval of the appointment of a trustee in bankruptcy rests in the sound discretion of the Referee, and that if reasonable men could differ as to the propriety of the action taken, there is no abuse of discretion to be reviewed and corrected by the Appellate Court (Petition, Appendix xii).

Reversing the District Judge, the Court of Appeals found that the Referee had acted within the discretion conferred upon him by the Bankruptcy Act in holding that the claims of the members of the Creditor's Committee, and other claims which the Committee had received as a result of a letter soliciting proxies, could not be voted for the election of the trustee in bankruptcy (Ref. Cert. T. R. 53-55). The Referee's Findings, which the Court of Appeals deemed sufficient to support the Referee's action in so disfranchising the creditors, were as follows (Petition, Appendix xiii):

1. That the bankrupt made a general assignment to the Board of Trade of San Francisco.

2. That claims were solicited by a Creditors' Committee (all of whom were members of the Board of Trade) on letterheads of the Board of Trade.

3. That the letter soliciting claims recited that the Creditors' Committee had been appointed at a meeting of the creditors held at the Board.

4. That the secretary of the Board of Trade was the general assignee for the benefit of creditors.

5. That it was the Committee's intention "indirectly to keep if possible some sort of control over the bankrupt's assets."

6. That it would not be "for the best interest of all the creditors to count the claims thus garnered in voting for any candidate for trustee."

"Considered separately", the court said, "none of these Findings might be thought sufficient to support the Referee's holding. * * * Taken together, however, they persuade us that whether we agree with them or not, they are Findings regarding which 'reasonable men could differ as to the propriety of the action taken' " (Petition, Appendix xiii, xiv).

Items 5 and 6 above are based upon the Referee's Findings 5, 8 and 9 for which there is no support whatsoever in the record, as follows:

(a) That the activities of the Creditors' Committee in connection with the assignment for the benefit of creditors and the affairs or property of the bankrupt were as members of the Board of Trade and not merely as creditors of the bankrupt (Ref. Cert. T. R. 51; Finding No. 5).

(b) That Hempy, the assignee for the benefit of creditors, performed his functions as such not as assignee on his own behalf but as secretary of the Board of Trade, and on behalf of the Board of Trade and its membership (Ref. Cert. T. R. 52; Finding No. 8).

(c) That it was the Committee's intention indirectly to keep, if possible, some sort of control over the bankrupt's assets (Ref. Cert. T. R. 52, 53; Finding No. 9).

The Referee refused to permit the attorney for the Committee to introduce evidence explaining the circumstances under which the assignment for the benefit of creditors was made, the Committee organized, the letter to creditors written and dispatched, the relationship between the Creditors' Committee and the Board of Trade, and other facts bearing upon the question of disqualification (T. R. 31-39).

Despite the exclusion of this proof and the absence of any other basis besides conjecture and unsupported inferences, the Court of Appeals held that "in disqualifying *Board-sponsored* creditors, the Referee exercised a sound discretion." (Italics ours. Petition, Appendix xvi.) Such holding could have been based only on the assumption, unsupported by proof, that because the members of the Creditors' Committee were members of the Board of Trade, they were "*sponsored*" by the Board of Trade, and thus were acting for the assignee for the benefit of creditors.

The candidate for trustee for whom the Creditors' Committee sought to vote was a wholly disinterested person having no connection with the Board of Trade and admittedly qualified (T. R. 54; Finding No. 14).

The decision of the Court of Appeals that creditors may be disfranchised upon the basis of unsupported inferences is to emasculate the provisions of Section 44a of the Bankruptcy Act and to make a mockery of the creditor's right to elect a trustee. The decision is directly contrary to the decisions of other Courts of Appeals cited in this brief which hold, without exception, that the Referee's power of disapproval may be exercised only upon the basis of a record showing that the candidate for trustee has interests

which conflict with those of general creditors or is otherwise a person unfit for the office, and only for "substantial reasons", and "for just cause". *In re Leader Mercantile Co.,* 36 F. (2d) 745 (C. C. A. 5); *In re Mayflower Hat Co.,* 65 F. (2d) 330 (C. C. A. 2); *Beale* v. *Snead,* 81 F. (2d) 970 (C. C. A. 4); *In re Merritt Construction Co.,* 219 F. 255 (C. C. A. 2); *In re Harris Construction Co.,* 37 F. (2d) 951 (D. C. Penn.); *In re Allied Owners' Corp.,* 4 Fed. Supp. 684 (D. C. E. D. N. Y.).

POINT I

The decision in this case is of paramount importance to the business interests of the country in that it strikes a crippling blow at the nation-wide system established by creditors to provide responsible administration for the estates of bankrupt businesses.

It is clear that the court in a proper case and for sufficient reasons may disapprove the person selected as trustee by the creditors, or refuse to allow creditors to vote where they have solicited claims in the interest of the bankrupt or of some interest adverse to that of general creditors. *In re Mayflower Hat Co.,* 65 F. (2d) 330. Such power of disapproval was originally embodied in General Order 13, since repealed, and incorporated into the Bankruptcy Act in 1938 as subdivision (17) of Section 2.

The right of creditors to elect a trustee is clearly and affirmatively set forth in Section 44a of the Bankruptcy Act, and that section enumerates certain classes of creditors who alone are not entitled to vote. It is not contended that any of the creditors here disfranchised were within the inhibited classes.

Concerted action for the election of a trustee is obviously necessary, for otherwise no candidate would secure the necessary majority of votes. Where creditors are scattered, as in most commercial bankruptcies, the right of creditors to organize, and to solicit proxies for the election of a trustee is their sole protection against persons seeking to control the election for improper purposes.

As stated in *2 Remington on Bankruptcy,* Section 1079:

> "It is clearly intended by the Bankruptcy Act that creditors should act in concert—not necessarily separately in each case, but also in permanent organizations in each trade or in permanent associations of credit men in several trades—to protect the credit system from the evil machinations of those who would take advantage of a business failure to perpetrate frauds or preferences; and such organizing, equally as clearly, implies the solicitation of claims so that the creditors may protect it in the instant case; so, it is not the fact of the solicitation of claims that is important, but the object for which they are solicited; if solicited in the interest of the bankrupt, or of some preferred creditor, who desires inaction rather than action, or solicited for some other sinister object, the discretion of the bankruptcy court to disapprove the choice, which is of course a judicial discretion if exercised in accordance with legal principles, would be proper; but where the solicitation is for the purpose of putting those in charge of the administration who will expose fraud and protect the estate, such solicitation should not be disapproved but

should be approved as tending to encourage creditors in that participation in bankruptcy administration which the law clearly intended should be encouraged."

The Board of Trade of San Francisco is one of a nation-wide system of organizations established by the local associations of credit men affiliated with the National Association of Credit Men and having its counterpart in 53 of the other leading commercial centers of the United States, which creditors have set up for the express purpose of insuring proper functioning of the system of creditor-control of elections which the Bankruptcy Act contemplates and provides for.

These organizations usually called "Adjustment Bureaus" (but in San Francisco and Los Angeles called "Boards of Trade", and hereafter in this brief referred to as "Bureaus") maintain staffs of highly skilled employees trained to assist creditors in insolvency cases and designed to minimize expenses and promote honest and efficient administration.

Debtors who find themselves in financial difficulties are encouraged by their creditors to bring their problems to these Bureaus at as early a stage as possible. The usual procedure is to call a meeting of creditors at the Bureau's office, at which time the creditors present elect a committee and select an attorney to represent them.

Where the machinery of investigation provided by the Bankruptcy Act is not needed, the debtor often (as in this case) puts his affairs in the hands of his creditors by making a common-law or statutory as-

signment for the benefit of creditors to a representative of the Bureau, or agrees with his creditors upon a simple extension of time for payment, continuing to operate his business meanwhile under the supervision of the committee and with the assistance of the trained staff of the Bureau.

If fraud is found or suspected, or voidable preferences have been given by the debtor, or if all creditors will not cooperate, the protective cloak of bankruptcy is invoked by asking the debtor to file a voluntary petition in bankruptcy, or the committee arranges for the filing of an involuntary petition. Thereafter the committeee, using the clerical assistance afforded by the Bureau, solicits the proxies of all creditors for the election of a suitable person as trustee.

It was this procedure that was followed in the case here sought to be reviewed:

(a) The debtor put his affairs in the hands of his creditors by making an assignment for the benefit of his creditors to the secretary of the Board of Trade (T. R. p. 46; Finding 1).

(b) A general meeting of creditors was held at the Board of Trade (T. R. 79) and a Committee, all of whom were members of the Board of Trade, elected (T R. p. 30).

(c) A voluntary petition in bankruptcy was filed by the debtor (T. R. p. 47).

(d) The Committee solicited proxies from all creditors, using the clerical facilities of the Board of Trade to prepare and mail the letter of solicitation with which was enclosed a form of proof of claim and power of attorney running to the attorneys for the committee (T. R. pp. 47, 51).

(c) The Committee's attorneys attempted to vote the claims thus received (constituting the statutory majority) for a candidate for trustee having no connection whatever with the Board of Trade, and admittedly qualified (T. R. 54; Finding 14).

On this state of facts the Referee held that the creditors who had given their proxies to the Committee's attorneys were disqualified to vote, because, he said:

(a) "That all the activities of the membership of said Creditors' Committee, in connection with the aforesaid assignment and the aforesaid affairs and/or property of said Alfonso Paul Sanfilippo, after the making, by said Alfonso Paul Sanfilippo, of the aforesaid assignment, were as members of said Board of Trade and not merely as creditors of said Alfonso Paul Sanfilippo" (Ref. Cert. T. R. 51; Finding 5); and

(b) "That in causing to be prepared and sent out, the aforesaid letter and each of the aforesaid nineteen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade" (Ref. Cert. T. R. 52; Finding 9).

For these Findings there was not a shred of evidence. Indeed when the attorney for the committee offered to prove the facts and circumstances attending the preparation and mailing of the committee's letter

to creditors and the committee's relation to the Board of Trade, the Referee denied the offer of proof (T. R. pp. 30, 31)!

On review the District Judge reversed, on the ground that there was no proper basis for disfranchising the creditors—nothing in the record to sustain the Referee's action.

In his opinion the District Judge said with respect to the foregoing:

> "From these facts the referee attempts to torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditors is under no such alleged disability except through the creditors who propose him. Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of a trustee by creditors * * *. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors" (T. R. 84).

The Court of Appeals however reversed the District Judge, and, basing its opinion on an alleged lack of abuse of discretion on the part of the Referee, held that, regardless of the proof sought to be offered by the Committee's attorney, the Committee was "Board-sponsored" (Petition, Appendix xvi), and was, there-

fore, presumably acting in the interests of the Board of Trade,—or of the assignee,—just which is not clear from the opinion.

Whatever may have been the theory, the net effect of the decision of the Court of Appeals is simply this: *A creditors' committee consisting of members of a credit organization, to the secretary of which an assignment for the benefit of creditors has been made, cannot vote for the election of a trustee however qualified and disinterested he may be.*

Thus a blow has been struck against the very agencies creditors have established to rid bankruptcy administration of the racketeer and the plunderer.

Because this decision affects the interests of almost 35,000 of the leading commercial and banking houses of the United States as represented in the nation-wide system of Adjustment Bureaus affiliated with the National Association of Credit Men, such Association urges that this decision be reviewed.

POINT II

The holding that creditors may be disfranchised on grounds not sustained by the record is an abuse of discretion and in direct conflict with decisions of the Courts of Appeals of other circuits.

The record in this case before the Referee consisted exclusively of the following:

1. The bankrupt's statement of affairs showing that he had made an assignment for the benefit of creditors to [the secretary of] the San Fransisco Board of Trade and "that at the time of

the filing of the petition in bankruptcy there was the sum of $4,054.88 held by the Board of Trade of San Francisco" (T. R. 13).

2. That at the first meeing of creditors 20 claims, aggregating in excess of $4,500, were voted for one John M. England as trustee, and that four claims, totaling approximately $500, were voted for Kal W. Lines as trustee (T. R. 28).

3. That the claims voted for Mr. England were solicited by the members of a creditors' committee and that all members of the creditors' committee were members of the Board of Trade (T. R. 29, 30).

4. That the letter by the creditors' committee soliciting claims was written on the letterhead of the Board of Trade of San Francisco (T. R. 49).

5. That the creditors' committee enclosed with its letter of solicitation, forms of proof of claim and power of attorney from which the name of the attorney for the San Francisco Board of Trade had been stricken out and the names of other and independent attorneys substituted (T. R. 51, 52).

Without any supporting proof the Referee found:

(a) that Walter J. Hempy, the assignee for the benefit of creditors, acted "not as an assignee on his own behalf but as the secretary of said Board of of Trade" (Ref. Cert. T. R. 52; Finding 8);

(b) that "it was the intent, on the part of such Creditors' Committee, acting for said Board of Trade, indirectly to keep if possible, some sort of control

over the assets of the estate of the above named bankrupt, * * *" (Ref. Cert. T. R. 53; Finding 9).

It has been established by the Courts of Appeals of other Circuits that creditors may not be disfranchised except for good cause, *supported by an adequate record,* which was here entirely lacking.

Thus *In re Hale Desk Co.,* 89 F. (2d) 1, the Circuit Court of Appeals for the Second Circuit, on the authority of *In re Mayflower Hat Co., supra,* that "for disapproval of a proxy, solicitation must have been intended to further the interest of the bankrupt or any interest alien to those of general creditors", held that it was improper for the court to disallow the votes of a majority of the creditors where the evidence supporting the claim of improper solicitation consisted mainly of the fact that some of the claims were received or obtained by a corporation managed and controlled by the bankrupt, the court said:

> "But that does not necessarily prove that the bankrupt's interests were being furthered, and may merely show that the bankrupt was cooperating with his creditors. *The Referee should have obtained further proof."* (Italics ours.)

And where the Referee had rejected the vote of a creditor on suspicion that he had obtained an unlawful preference, the court said:

> "If there was any basis for the suspicion entertained by the Referee, *he should have undertaken to obtain facts* which under Section 57g of the Bankruptcy Act, 11 U. S. C. A. 93 (g), would have warranted the disallowance of the claim. It did not justify the denial of the right to vote

a claim which was prima facie valid under Section 57a (11 U. S. C. A. 93 (a)). *In re Bronx Ice Cream Co.*, 66 F. (2d) 620 (C. C. A. 2). *If the Referee was informed of facts, as he stated, which he unearthed in an ex parte investigation conducted at the suggestion of the senior district judge, he should not have permitted such information to influence his judgment.*" (Italics ours.)

Again, where the Referee had rejected the vote of a liquidated claim for rent because it would have to be "vigorously fought" and because of facts uncovered by the Referee in the investigation but unrevealed to the creditor or to the court, the court said:

> "The extent to which claims should be established before the election of a trustee may present a troublesome question * * *; but that does not mean that a claim, clearly prima facie valid, may not be voted because of supposed but undisclosed questions which might arise later in connection with the claim."

In *In re Bay Parkway Haberdashers and Hatters, Inc.*, 59 Fed. (2d) 103, where the Referee had declined to certify the election as trustee because the candidate's election was allegedly controlled by the attorneys for a prior assignee for the benefit of creditors, the Circuit Court of Appeals for the Second Circuit reversed *on the ground that the record did not support the conclusion of the Referee* that the disqualified candidate was in fact controlled by the assignee's attorneys. The court said:

> "by statute the unqualified right to appoint trustees in bankruptcy rests in the creditors * * *. Disapproval or removal must be based upon the

> exercise of wise judicial discretion. There must be reason for approval or disapproval. *In re Mayflower Hat Co.*, 65 F. (2d) 330 (C. C. A. 2). Insufficient reason existed here for refusing the appointment of Olsen as trustee."

See also *In re Kutcher*, 69 F. (2d) 104 (C. C. A. 2); *Wilson* v. *Continental Building & Loan Assn.*, 232 F. 824 (C. C. A. 9); *Sheinberg* v. *Hoffman*, 236 F. 343 (C. C. A. 3).

In *In re Paramount Publix Corp.*, 68 F. (2d) 703, cert. denied, 292 U. S. 652, the Circuit Court of Appeals for the Second Circuit said with respect to the exercise of the discretionary power to approve or disapprove a candidate for trustee:

> "*He must permit a disclosure of facts upon which the exercise of discretiaon must be based before he can properly approve the trustee and, to be sustained, the record before him must show a basis for the exercise of sound discretion.*" (Italics ours.)

As established by the foregoing decisions, and by the cases cited in the Petition (pp. 11-16), the decision of the court in the instant case is contrary to a long line of authorities holding that approval or disapproval of the creditors' choice of trustee must be for reason, and *must be based upon facts supported by the record.*

The decision in this case, we submit, was not based upon the exercise of such sound judicial discretion and upon such proof as the authorities cited have invariably deemed essential.

POINT III

The decision in this case is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Garrison* v. *Pilliod Cabinet Company*, 50 F. (2d) 1035.

The decision in this case, so far as it holds that claims may not be voted where solicited by a trade association, to an employee of which an assignment for the benefit of creditors had been made by the bankrupt, directly conflicts with the decision of the circuit Court of Appeals for the Ninth Circuit in *Garrison* v. *Pilliod Cabinet Company* (50 Fed. (2nd) 1035).

In that case Mr. Garrison, the manager of the Wichita Association of Credit Men (an organization affiliated with the National Association of Credit Men) held a trust mortgage on the debtor's assets, which was equivalent to a common-law assignment for the benefit of creditors. A petition in bankruptcy was filed against the trust mortgagor, and Garrison caused the National Association of Credit Men to send a letter to creditors asking them to send their claims to the Wichita Association so that the Association might control the administration of the estate. When the Wichita Association attempted to vote the claims for Garrison as trustee, objection was raised on the ground that the claims had been solicited by the Association while Garrison was assignee and that such solicitation was prohibited by General Order 39 (11 U. S. C. A., Section 53), which in terms prohibits a receiver or his attorney from soliciting "any proof of debt, power of attorney, or other authority

to act for, or represent any creditor for that purpose. * * *"

The Circuit Court of Appeals held that the General Order had no application and should not be extended to assignees or to other parties not actually named. The court said:

> "It is said the solicitation of claims by a party disqualifies it to act as trustee. We think this fact alone is an insufficient test to be applied, without an inquiry into other considerations, *affecting the fitness of the applicant.*" (Italics ours.)

While holding that the claims might not properly be voted for Garrison as trustee, in view of the fact that he was the assignee for the benefit of creditors, the court overruled the objections based upon the Association's solicitation of claims while its employee was the assignee for the bankrupt's creditors.

In the instant case the claims were not solicited by the Board of Trade, to the secretary of which the assignment for the benefit of creditors was made, but rather by a Creditors' Committee which had no established connection with the assignee for the benefit of creditors except the fact that they were members of the Board of Trade. They did not seek to vote the claims for any representative of the Board of Trade but for a disinterested and fully qualified stranger.

In the absence of evidence supporting the Referee's and the Court of Appeals' inferences of an improper connection between the creditors and the assignee, we submit that there was no basis upon which (to

paraphrase the language of the Court of Appeals) any reasonable man could arrive at the conclusion that the discretion of the Referee was properly exercised.

Conclusion

For the reasons above stated, we believe that without any substantial reason the statutory right of creditors to elect a trustee of their own choosing has, in this case, been arbitrarily denied, and that the decision is of such far reaching importance to the business interests of this country that it should be reviewed and reversed by this Court, and that the order of the District Court reversing the Referee (T. R. pp. 79 to 85) should be affirmed.

Dated: New York, N. Y.
September 11, 1956.

Respectfully submitted,

W. Randolph Montgomery
Attorney for National Association of Credit Men, as Amicus Curiae

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JOHN T. FEY, C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

OBJECTION TO MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN TO FILE BRIEF AS AMICUS CURIAE.

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Petitioners,

vs.

KAL W. LINES,

Respondent.

OBJECTION TO MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN TO FILE BRIEF AS AMICUS CURIAE.

Respondent Kal W. Lines objects to the motion for leave to file brief as *amicus curiae*, and withheld con-

sent to the filing thereof, for the following and each of the following reasons:

1. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW.**

The decision of the Court of Appeals is to the effect that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence, and that *under the facts and circumstances of the particular case* the referee exercised a sound legal discretion in doing so. The decision was confined and will be confined to the factual setup of the particular case, and it poses no important question of law requiring settlement by this Court.

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2. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A CONFLICT OF DECISION.**

A plain reading of the case of *Garrison v. Pilliod Cabinet Co.*, 50 F. 2d 1035, upon which the amicus curiae brief as well as the petition for certiorari relies as basis for a contention that conflict of decision exists, brings the ready conviction that the cited case is in harmony rather than in conflict with the decision herein.

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3. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A DECISION THAT IS INCORRECT.**

The decision of the Court of Appeals is its own best advocate. It is sound in law and sound in fact and no occasion exists for disturbing it.

4. THE PROPOSED BRIEF OF AMICUS CURIAE DOES NOT SHOW INADEQUACY OF PRESENTATION BY THE PETITIONERS.

The proposed amicus curiae brief is virtually a rubberstamp of the petition, and relies upon the same cases. Realistically viewed, it adds little more than that other Boards of Trade or Credit Associations are willing to add their weight to petitions for certiorari sponsored by one of their members. The motion to file should be denied because there is no inadequacy in presentation by the petitioners for certiorari.

Wherefore, respondent respectfully submits that the motion of National Association of Credit Men for leave to file brief as amicus curiae should be denied.

Dated, San Francisco, California,
September 24, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.